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No. 85-2101

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOSE SERRA, PETITIONER

v.

PAUL A. PICHARDO AND ROBERT ELSEA, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that the court of appeals erred in holding that a district court judgment against the United States under the Federal Tort Claims Act barred a judgment against respondents on petitioner's *Bivens* claims (*Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971)).

1. a. Petitioner, formerly a federal prisoner, sued the United States and respondents Pichardo and Elsea, a prison doctor and the warden. In an action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.,* petitioner alleged that the prison doctor's negligent handling of a medical emergency that arose during a 36-hour period beginning on the morning of June 2, 1983, caused an otherwise unnecessary amputation of his right leg. Petitioner also sued the prison doctor

and the warden, alleging that the conduct of each constituted deliberate indifference to his medical needs in violation of the Eighth Amendment. Pet. App. 1a-3a.

At trial, the United States stipulated to the negligence of its officers and employees, thus admitting liability under the FTCA and limiting the dispute on that claim to the amount of damages. The jury that was empaneled to try petitioner's *Bivens* claims against the respondents also served as an advisory jury on the FTCA claim. Based on the evidence, the district court directed a verdict in favor of the warden. The jury, however, returned an advisory verdict of $625,000 as compensatory damages against the United States and a verdict of $15,000 in punitive damages against the prison doctor (Pet. App. 3a). The district judge adopted the advisory verdict and entered judgment against the United States on the FTCA claim and against the prison doctor on the *Bivens* claim.

b. Respondent Pichardo appealed from the judgment against him on the ground, among others, that the judgment entered against the United States on petitioner's FTCA claim barred petitioner's *Bivens* action against the individual defendants.[1] The court of appeals agreed that, under the terms of the FTCA, the judgment against the United States on petitioner's negligence claim barred his *Bivens* action against respondents. 786 F.2d 237 (1986). Accordingly, the court of appeals affirmed the directed verdict in favor of respondent Elsea, reversed the judgment against respondent Pichardo, and remanded the case to the district court with instructions to enter judgment in favor of respondent Pichardo.

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[1]Initially, the United States appealed from the judgment against it, and petitioner cross-appealed, each challenging the amount of damages awarded. Both the United States' appeal and petitioner's cross-appeal were voluntarily dismissed.

2. The decision of the court of appeals is a straightforward application of 28 U.S.C. 2676, which provides:

> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

Petitioner obtained a judgment against the United States in an action under Section 1346(b), and therefore he is barred from maintaining an action against respondents by reason of the same subject matter.[2]

Petitioner offers no construction of the statutory language, no legislative history, and no conflicting decision of another court of appeals to support his contrary argument. Instead, he relies on *Carlson* v. *Green,* 446 U.S. 14 (1980). In *Carlson,* the plaintiff had not brought an action against the United States, but had brought a *Bivens* action against individual federal employees only. The Court held that the mere availability of an FTCA action did not preclude the *Bivens* claim because there was "no explicit congressional declaration" that the availability of an FTCA claim precluded a *Bivens* claim (446 U.S. at 19). By contrast, Section 2676 is an explicit congressional declaration that pursuing an FTCA claim to judgment does preclude any other action by reason of the same subject matter against the federal employee whose act or omission gave rise to the claim.

Petitioner could have forgone or postponed his FTCA action against the United States and brought himself squarely within the rule of *Carlson.* By pursuing his FTCA

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[2]The court of appeals explicitly held (Pet. App. 4a-8a) that petitioner's action against respondents is by reason of the same subject matter as his judgment against the United States, and petitioner offers no basis to question that holding.

claim to a judgment of $625,000, however, petitioner brought himself within the rule of Section 2676 barring contemporaneous or subsequent recovery against respondents. See 2 L. Jayson, *Handling Federal Tort Claims* § 310, at 16-81 (1986) ("If the government employee and the United States are sued in the same suit, entry of judgment against the United States clearly bars entry of a judgment against the employee.").

The court of appeals took note of *Carlson* and correctly distinguished it (786 F.2d at 241 (footnote omitted)):

> In *Carlson,* the Court held that a *Bivens* remedy is available to a plaintiff even though a plaintiff's allegations also could have supported a suit against the United States under the FTCA. But the instant case, unlike *Carlson,* deals with the effect of a FTCA judgment on a plaintiff's power to continue to pursue a *Bivens* remedy. As noted above, the scope of that power is defined and limited by a section of the FTCA that the Court in *Carlson* had no occasion to address.

Thus, although this Court in *Carlson* may have suggested that a claim brought against the United States under the FTCA and a *Bivens* claim brought against a government employee in his individual capacity might be complementary causes of action, nothing in *Carlson* contradicts the court of appeals' reading of the plain language of Section 2676: that a *judgment* against the United States under the FTCA bars further pursuit of a complementary *action* against a federal employee.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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